Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

TROOPER TOMMY HOBBS,

Petitioner,

v.

KATHY LEE GEORGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March, 1999

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QUESTION PRESENTED

1. Does the Court of Appeals have jurisdiction to entertain an appeal from the denial of a Rule 50(b) motion brought after a mistrial when qualified immunity had been asserted and there was no evidence presented showing what a reasonable officer would have done in the same circumstances in an excessive force case?

LIST OF PARTIES

The parties to this proceeding on Petition for Writ of Certiorari are:

Petitioner:

Trooper Tommy Hobbs

Defendant in the District Court and Appellant in the United States Court of Appeals for the Tenth Circuit

Respondent:

Kathy Lee George

Plaintiff in the District Court and Appellee in the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

Trooper Tommy Hobbs respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Order of the United States Court of Appeals for the Tenth Circuit dismissing Petitioner's appeal is dated February 8, 1999. Order, Case No. 98-7058 (Appendix A).

The United States Court of Appeals' Order dismissed the appeal on the basis that it lacked jurisdiction for the appeal from the United States District Court for the Eastern District of Oklahoma's denial of Petitioner's Motion for Judgment pursuant to Rule 50(b)(2)(B) of the Federal Rules of Civil Procedure based on the defense of qualified immunity (Appendix B).

The opinions of the Court of Appeals and the district court are unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit dismissed the appeal for lack of jurisdiction over the appeal of the denial of a Motion for Judgment pursuant to Fed. R. Civ. P. 50(b)(2)(B) on February 8, 1999. Petitioner invokes this Court's jurisdiction pursuant to 28

U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed within 90 days of February 8, 1999.

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Code, Title 42:

§ 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979, Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Amendment IV Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. This is an action pursuant to 42 U.S.C. § 1983, wherein George seeks recovery against Hobbs while Hobbs was acting under color of state law as a Trooper for the Oklahoma Highway Patrol.

2. Prior to the trial, the district court granted Hobbs' motion for summary judgment as to all of the Plaintiff's claims except the excessive force claim.

3. The case went to trial and to the jury on the sole question of whether the Defendant used excessive force against the Plaintiff.

The jury was hopelessly deadlocked so the District Judge declared a mistrial.

5. After the mistrial, Hobbs renewed his motion pursuant to Fed. R. Civ. P. 50(b) because Plaintiff failed to introduce any evidence showing what a reasonable officer would have done in the same circumstances. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872 (1989) (whether the force was reasonable must be judged from the perspective of a reasonable officer on the scene).

6. The District Judge denied the motion and Hobbs appealed to the Tenth Circuit.

7. The issue on appeal was whether Hobbs was entitled to judgment based in part on qualified immunity.

8. The Court of Appeals for the Tenth Circuit declined to accept jurisdiction of the appeal. It held that a "renewed motion under Rule 50(b) is not appealable" until the district court disposes of the claim. The Tenth Circuit also held that "even if Defendant's motion were

construed as raising qualified immunity, the district court in denying the motion arguably believed the trial testimony contained sufficient fact-related information questioning the reasonableness of Defendant's use of force." (Court of Appeals slip op. at 2).

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to resolve a conflict between the Circuits and to correct a lower court error.

I. THE CIRCUITS ARE IN CONFLICT.

In a case with a similar procedural history, the Second Circuit Court of Appeals found that it did have jurisdiction. *O'Neill v. Town of Babylon*, 986 F.2d 646 (2nd Cir. 1993) was a Section 1983 case where the district court denied the defendant's Rule 50 motions but granted his new trial motion. The defendant maintained on appeal that the district court should have granted the Rule 50 motions on the basis of qualified immunity. In determining that it had jurisdiction to hear the appeal, the Second Circuit reasoned that:

> [d]espite the absence of a final order, appellate jurisdiction is conferred in cases involving qualified immunity to protect government officials not only from liability for their actions but from the cost and inconvenience of having to defend an action through trial.

Id. at 649. In *O'Neill*, the plaintiff asserted that there were unresolved questions of fact and therefore there was a lack of jurisdiction. The Second Circuit determined that since there had been a "significant amount of pre-trial discovery and a full trial" that as "far as the discrete question of immunity is concerned, all material issues of fact concerning" the plaintiff's arrest "have been fleshed out at trial. A further factual inquiry is not necessary to resolve the question of qualified immunity as a matter of law." *Id.* Accordingly, since the issue of qualified immunity could be determined as a matter of law, there was jurisdiction to hear the appeal of denial of Rule 50 motions when the district court had ordered a new trial and the defendant was entitled to qualified immunity. *Id.*

In this case, the Tenth Circuit Court of Appeals refused to take jurisdiction of the appeal because the district court had not disposed of the excessive force claim, even though the Defendant had raised qualified immunity. This decision is in direct conflict with the Second Circuit's holding. The Defendant's Rule 50(b) motion was denied by the district court after a mistrial was declared due to a hung jury. The Plaintiff introduced no evidence concerning what a reasonable officer would have done in the same circumstances, thereby failing to offer any evidence that the Defendant did not use reasonable force. The Tenth Circuit found that it did not have jurisdiction even though the Defendant had asserted qualified immunity because the claim had not been disposed of by the district court. The Tenth Circuit also found that arguably the district court believed there were unresolved fact questions. Since the Second Circuit and the Tenth Circuit held differently on the same issue, there

is a clear conflict among the circuits. This Court should accept this Petition to decide the conflict.

II. THE TENTH CIRCUIT ERRED.

In addition, the Tenth Circuit Court of Appeals' refusal to take jurisdiction of an appeal of the denial of qualified immunity is in conflict with this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985) where this Court held:

> a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.

Id. at 530. This Court reasoned that qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526 (emphasis in original).

The timing of the decision on the qualified immunity issue is not relevant to the jurisdiction of the Tenth Circuit Court of Appeals. Qualified immunity is immunity from suit and the immunity is lost if the defendant is forced to trial. *Mitchell, supra* at 526. In this case, if Hobbs is compelled to a second trial, the immunity would be effectively lost. The reasoning of *Mitchell* is especially applicable *because* Hobbs has already been through discovery and one trial and "[a] further factual inquiry is not necessary to resolve the question of qualified immunity as a matter of law." *O'Neill*, 986 F.2d at 649. The Tenth Circuit's refusal to accept jurisdiction deprives Hobbs of

the benefits of immunity from suit. Since the Tenth Circuit erred in refusing to accept jurisdiction when the Defendant had asserted qualified immunity, this Court should accept this Petition in order to correct the error of the Tenth Circuit.

CONCLUSION

This Court should grant certiorari to review the Tenth Circuit Court of Appeals' decision that it lacked jurisdiction and upon review, remand with instructions to consider the appeal on the merits.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KATHY LEE GEORGE, Plaintiff - Appellee, v. TOMMY HOBBS, etc., Defendant - Appellant.	No. 98-7058

ORDER

Filed February 8, 1999

Before **PORFILIO, BALDOCK,** and **EBEL,** Circuit Judges.

This appeal is before the court based on a show cause order challenging appellate jurisdiction, the parties' jurisdictional memorandum briefs, and the preliminary record on appeal.

Plaintiff Kathy Lee George initiated a civil rights action alleging various constitutional violations arising out of her arrest and transport by a state highway patrol officer to a county jail after a traffic stop. In February 1998, the district court granted the remaining Defendant Tommy Hobbs' motion for summary judgment as to all of Plaintiff's claims except the excessive force claim. After a jury trial and approximately five hours of deliberation, the jury returned deadlocked. The district court declared a mistrial and ordered a new trial on the excessive force

claim. Defendant Hobbs filed a renewed motion under Fed. R. Civ. P. 50(b), contending the evidence was insufficient for a jury to conclude he used excessive force. The motion was denied. Defendant appeals. The excessive force claim remains unadjudicated.

The appeal is jurisdictionally defective. The district court order denying Defendant's renewed motion under Rule 50(b) is not appealable until the district court disposes of the remaining claim. *See Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1542 (10th Cir.), *cert. denied*, 117 S.Ct. 297 (1996). Thus, this court lacks appellate jurisdiction. Moreover, even if Defendant's motion were construed as raising qualified immunity, the district court in denying the motion arguably believed the trial testimony contained sufficient fact-related information questioning the reasonableness of Defendant's use of force.

The appeal is DISMISSED. The mandate will issue forthwith.

Entered for the Court,
Patrick Fisher, Clerk

FILE COPY

United States District Court
for the Eastern District of Oklahoma
April 27, 1998

Keith A. Ward, Esq.
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CIVIL MINUTES

6:97-cv-00535 George v. Hobbs

DOCKET ENTRY

MINUTE ORDER: denying defendant's renewed motion for judgment. (FHS) [45-1] (cc: all counsel)

WILLIAM B. GUTHRIE, Clerk

By: /s/ Tami Collins
Deputy Clerk

THIS NOTICE SENT TO THE FOLLOWING COUNSEL:

Keith A. Ward, Esq.
Richard A. Ford, Esq.
Charles K. Babb, Esq.
Tracy F. Milner, Esq.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST:

WILLIAM B. GUTHRIE
Clerk, U.S. District Court
Eastern District of Oklahoma
BY /s/ Lisa Wilson
Deputy Clerk
DATED 5/1/98